

1994

# Norma Howard v. State of Utah : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 940010CA

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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|                       | : | BRIEF OF APPELLANT |
| Petitioner/Appellant, | : |                    |
|                       | : |                    |
| vs.                   | : | Case No. 940010CA  |
|                       | : |                    |
| STATE OF UTAH,        | : |                    |
|                       | : | Priority No. 15    |
| Respondent/Appellee,  | : |                    |

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APPEAL FROM THE THIRD CIRCUIT COURT  
IN AND FOR SALT LAKE COUNTY  
THE HONORABLE SHEILA McCLEVE

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**FILED**  
Utah Court of Appeals

FEB 9 1994

  
Mary T. Noonan  
Clerk of the Court

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STATEMENT OF JURISDICTION

Jurisdiction over appeals from circuit courts is conferred on the Utah Court of Appeals by Section 78-20-3(2)(d), Utah Code.

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

Standard of Review as to All Issues

All of the issues were decided within the context of the granting of a motion for summary judgment. This court stated the applicable standard of review in Briggs v. Holcomb, 740 P.2d 281, 283 (1987), thusly:

On reviewing a summary judgment, an appellate court applies the same standard as that applied by the trial court. Durham v. Margetts, 571 P.2d 1332, 1334 (Utah 1977). "[W]e consider the evidence in the light most favorable to the losing party, and affirm only where it appears there is no genuine dispute as to any material issues of fact, or where, even

according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law." Themy v. Seagull Enterprises, Inc., 595 P.2d 526, 528-29 (Utah 1979).

### Issues on Appeal

1. Whether the subject automobile was "used . . . in any manner to facilitate . . . simple possession . . . of a controlled substance" and therefore was subject to forfeiture under Section 58-37-13, Utah Code, because a driver happens to have marijuana in his pocket while moving the automobile out of the way of his own vehicle.

2. Whether the appellant was an "owner" of the automobile within the meaning of Section 58-37-13(1)(e)(ii), Utah Code, such that her lack of knowledge of and consent to the illegal use by a nominal joint owner would preclude forfeiture under that section.

3. Whether forfeiture is precluded because of violation of the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Constitution of Utah because:

a) There was no record of the purported warrant that was claimed to justify the detention and search of the driver and the initial seizure of appellant's automobile.



b) The vehicle was seized without prior process specifying the automobile and there were no exigent circumstances which justified a seizure without obtaining prior process.

#### DETERMINATIVE LAW

Section 58-37-13, Utah Code, provides in pertinent part:

Property subject to forfeiture - Seizure  
- Procedure

(1) The following are subject to forfeiture and no property right exists in them:

. . . .

(e) all conveyances including aircraft, vehicles, or vessels used or intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, simple possession, or concealment of property described in Subsection (1)(a) and (1)(b), except that:

. . . .

(ii) a conveyance may not be forfeited under this section by reason of any act or omission committed or omitted without the owner's knowledge or consent, and

(iii) any forfeiture of a conveyance subject to a bona fide security interest is subject to the interest of a secured party who could not have known in the exercise of reasonable diligence that a violation would or did take place in the

use of the conveyance.

The Fourth Amendment to the United States Constitution, provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 14 of the Constitution of Utah is substantively identical to the Fourth Amendment, supra,

#### STATEMENT OF THE CASE

##### (a) Nature of the Case

This is an appeal of an order of the Third Circuit Court granting summary judgment for the respondent/appellee State and denying the petitioner/appellant's cross motion for summary judgment on a petition for the return of an automobile seized for forfeiture pursuant to Section 58-37-13, Utah Code. (The Controlled Substance Act).

### **(b) Course of the Proceedings**

The appellant, pursuant to Section 58-37-13(9)(e), Utah Code, brought a Verified Petition for Release of Property seeking the return of the property, including the subject automobile, seized in a drug raid. (R-1). The State released some of the property but filed an Answer (R-44) seeking the forfeiture of the automobile and at the same time filed a motion for summary judgment and supporting memorandum (R-50) and affidavit. (R-56). The appellant responded with a cross motion for summary judgment (R-60) and supporting memorandum (R-61) and affidavits. (R-72-81).

### **(c) Disposition in Circuit Court**

After oral argument, the circuit court issued an order on December 13, 1993, granting the State's motion and denying the appellant's cross motion for summary judgment. (Appendix; R-97). The appellant filed a notice of appeal to this court on January 10, 1994.

### **(d) Statement of Facts**

The underlying facts were not in dispute. The subject property was an automobile ("the Mustang") which had been given to the petitioner/appellant, Norma Howard, ("the

wife"). (R-73,76,79). The automobile was registered by her husband, Leon Howard, to "Leon (or) Norma Howard." (R-57). Both the wife and her husband regarded the Mustang as the sole property of the wife (R-77, 80) and the wife had requested that Legal Services obtain an award of the Mustang in a divorce that Legal Services was to seek for her. (R-80). The husband has his own vehicle and did not drive the Mustang without the express permission of the wife and had done so only on rare occasion. (R-77).

On the date of the seizure, the wife had parked the subject automobile behind her husband's truck blocking it in the driveway of their home. (R-77, 80-81). When the husband went to leave, the wife told him to move her Mustang himself so he could get his own truck out of the driveway because she was busy. Ibid. As the husband was moving the Mustang within the driveway, he was blocked by a police car, detained and searched by police officers (R-77) who were acting under the color of a purported search warrant for his person and the residence. (R-56-57). A small quantity of marijuana, which the husband had forgotten, was found in the pocket of his pants and he was arrested. (R-57-77). There is nothing in the record indicating that any contraband was located in the Mustang.

The automobile was seized for forfeiture "incident to the arrest of the husband." (R-57). The purported search warrant for the residence and the person of the husband did not specify the automobile.<sup>1</sup> No process for the seizure of the Mustang was ever issued, nor did any magistrate or judge authorize the seizure until the order appealed here was issued over three months after the seizure.

The alleged warrant, that was claimed to justify the detention and search of the husband as well as the residence, was purported to have been issued by the Third Circuit Court.<sup>2</sup> However, there was no record of any such warrant for the husband or the residence in the Third Circuit Court. That is, not only was there no application and supporting affidavit and no return, but there was no indication that the court had ever issued such a warrant up to and including the time of submission of the cross motions for summary judgment at the end of November, 1993.<sup>3</sup>

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<sup>1</sup>A copy of the purported warrant that was left at the residence was attached to the Verified Petition (R-6).

<sup>2</sup>See Note 1.

<sup>3</sup>This negative fact is supported in the record by a statement in the Verified Petition, dated September 28, 1993 (R-2); a representation in the Memorandum in Opposition that the clerk of the court had reported as of November 23, 1993, that there was nothing on file with regard to such a search warrant. (R-68). The State offered nothing to the contrary.

The husband admitted to possession of marijuana and pled guilty to that offense in the Circuit Court.<sup>4</sup> The wife denied giving her husband permission to possess marijuana in her Mustang and denied that she had any knowledge of him doing so until after he was arrested. (R-80). Her permission as to the Mustang was limited to allowing her husband to move the automobile a few feet so that he could get his own truck out of the driveway. Ibid. The petitioner was aware that her husband used marijuana but had not approved of his keeping it in their house and had argued about that with him. (R-78,80).

#### SUMMARY OF ARGUMENT

##### Point I: The Vehicle Was Not Subject to Forfeiture.

The Mustang automobile was not subject to forfeiture because it was not put to a use which in any manner facilitated the possession of marijuana. It was undisputed that the driver, who happened to have marijuana in his pocket, was moving the Mustang just so that he could leave in his own truck which was blocked in the driveway by the Mustang. That

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<sup>4</sup>State v. Leon Howard, Third Circuit Court, S.L. Dept., No. 931012672 F.S., brought to the trial court's attention. (R-63-64).

use did not facilitate the possession of the contraband as the statute requires to subject the vehicle to forfeiture.

**Point II: As an Innocent Owner Appellant  
Was Entitled to the Return of Her  
Vehicle.**

The Utah statute provides that a vehicle may not be forfeited by reason of an act committed without the owner's knowledge or consent and it was undisputed that the possession of marijuana was without the wife's knowledge and consent.

A. The circuit court erroneously applied the federal constitutional due process test rather than the Utah statutory test and erroneously required that the wife prove that the vehicle was moved without her consent or that she had done all she could to prevent the offense.

B. The undisputed facts showed that the wife was the actual and equitable sole owner of the Mustang. The facts that the Mustang was registered in the alternative names of the husband and wife and that the Motor Vehicle Code provides that either joint owner can endorse the certificate of title and transfer ownership have no bearing on determining ownership under the forfeiture statute.

C. Even if the wife were considered a co-owner with the guilty husband, the statute protects an innocent co-owner. The cases from other states interpreting similar statutes overwhelmingly hold that such statutes protect the innocent co-owner, either by precluding forfeiture altogether or protecting the innocent owner to the extent of her interest, and reject arguments attributing guilt or knowledge from the guilty to the innocent co-owner.

D. The appropriate relief under the Utah statute is to preclude forfeiture altogether where there is an innocent co-owner. Alternatively, if the Utah statute protects the innocent co-owner to the extent of her interest, the innocent wife's interest in this case is to the entire vehicle and she is entitled to its return.

**Point III: Forfeiture is Precluded by  
Constitutional and Statutory Violations  
in the Seizure.**

A. There was no record of the purported search warrant, that was the claimed justification for the initial seizure of the person of the husband and the wife's Mustang and the search which produced the contraband, in the court which allegedly issued that warrant. Such a failure to comply with the requirements for issuing a search warrant



deprives the warrant of presumed validity and renders the searches and seizures invalid and the evidence obtained inadmissible in a forfeiture matter.

B. The circuit court lacked jurisdiction, even if the purported search warrant for the husband's person were valid, because the vehicle was seized without process specifying the Mustang and there were no exigent circumstances that would excuse the failure to get such a warrant.

#### DETAILS OF THE ARGUMENT

##### I. THE VEHICLE WAS NOT SUBJECT TO FORFEITURE BECAUSE IT WAS NOT USED TO FACILITATE THE POSSESSION OF MARIJUANA.

The subject vehicle, the Mustang, was not put to a use which would bring it within the purview of the forfeiture statute, Section 58-37-13, Utah Code. That section provides in pertinent part:

(1) The following are subject to forfeiture and no property right exists in them:

. . . .

(e) all conveyances . . . used or intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, simple possession, or concealment of [controlled substances or paraphernalia for trafficking in con-

trolled substances] . . .

The court below held that, because the husband of appellant was in the car with marijuana in his pocket, the "car was used in a manner that facilitated the possession and is therefore subject to forfeiture." (R-97-98, Appendix i-ii).

Appellant contends that this is an erroneous interpretation and application of the statutory language to the undisputed facts. While the use of the modifying phrase, "in any manner" renders the scope of the verb "facilitate" broad indeed, the conveyance must none-the-less be shown to have been used in some manner to facilitate the possession of the contraband. Forfeiture provisions are not favored in the law and are strictly construed. Russell v. Park City Utah Corp., 548 P.2d 889, 891 (Utah 1976) (Contract law context); In re Forfeiture of One 1970 Ford, 823 P.2d 339, 341 (N.M. Ct. App. 1991); One 1978 Chevrolet Van v. County of Churchill, 634 P.2d 1208, 1209 (Nev. 1981).

It was undisputed that the only, "use" to which appellant's husband was putting the Mustang was to move it a few feet so that it was no longer blocking his own truck in the driveway. There was no nexus whatsoever between this "use" of the Mustang and the possession of the marijuana which just

happened to be stored unconsciously in the husband's pocket. The only nexus between the marijuana and the Mustang was that of proximity. While the Utah legislature could have provided for the forfeiture of any vehicle in which contraband was located, it chose not to do so. Compare the Utah Statute with Section 932.703, Florida Statutes (1985), quoted in State v. Crenshaw, 548 So.2d 223, 224-225 (Fla. 1989).

The appellant is not arguing that the vehicle is not forfeitable simply because the contraband was in the husband's pocket rather than found somewhere in the car. If the defendant had been using the Mustang to transport the marijuana to another location, for example, it would not make any difference that the marijuana was in the husband's pocket rather than on the seat beside him. State v. Pudzis, 507 So.2d 531 (Ala. Cir. App. 1987). Appellant is contending that the husband's use of the Mustang in all the circumstances of this case did not facilitate his possession of marijuana in any way, not even serving as a holding receptacle while he drove.

The Utah statute requires that the use of the vehicle "facilitate" the possession (or other prohibited conduct). "Facilitate" means "to make easy or less difficult." Webster's Collegiate Dictionary. The Mustang was not being

used to make the husband's possession of marijuana "easy or less difficult." Certainly that possession would not have been made more difficult if the Mustang had not been parked where it was blocking his own vehicle and the husband had not had to move it.

II. AS AN INNOCENT OWNER, APPELLANT WAS ENTITLED TO THE RETURN OF HER VEHICLE.

The Utah forfeiture statute provides an express "innocent owner" defense to forfeiture of vehicles in Section 58-37-13(1)(e)(ii), Utah Code, as follows:

a conveyance may not be forfeited under this section by reason of any act or omission committed or omitted without the owner's knowledge or consent.

Despite the undisputed evidence that the wife did not have knowledge of or consent to her husband's possession of marijuana in the Mustang, the court below concluded that she was not entitled to the statutory protection. (R-98, Appendix ii).

A. Federal case law does not modify the Utah statutory innocent owner defense.

The court below, in its Order Granting Respondent's

Motion for Summary Judgment concluded:

Further, even if Petitioner could assert an innocent owner's interest, she does not argue that the car was either moved without her consent or that she did what she reasonably could to prevent the illegal use of the car by the defendant. Under federal case law only these two circumstances would support her assertion against forfeiture.

Ibid. Thus the circuit court, citing federal case law, added an additional requirement that is not required by the Utah statute to qualify an innocent owner to protection against forfeiture. While appellant also contends that she did do all that she reasonably could to prevent the illegal use, more importantly she contends that the circuit court erred in concluding that she had to meet either that requirement or show that the car was moved without her consent.

The "federal case law" referred to originates with Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed. 452 (1974), wherein the Supreme Court upheld a forfeiture under Puerto Rican law against a due process attack. The Puerto Rican forfeiture law, unlike the Utah statute, had no provision providing protection to innocent owners. In dicta, the court observed that, if an owner could show that the forfeited conveyance was taken

without his consent or that he had done all he could to prevent unlawful use, it would be difficult to reject a constitutional claim. 416 U.S. at 686, 94 S.Ct. at 2094. The Supreme Court, by suggesting the minimal standard for protection that is required by federal constitutional law did not mean to preclude a state from providing more protection to innocent owners in its state forfeiture statute. E.g., State v. One 1984 Toyota Truck, 533 A.2d 659, 665 (Md. 1987). In re Forfeiture of \$53.00, 444 N.W.2d 182, 186-187 (Mich. Ct. App. 1989).

The United States Supreme Court has recently applied the innocent owner protection which now appears in the federal controlled substance law to preclude the forfeiture of a home purchased by the mistress of a drug dealer with funds that were a gift to her and traceable to a illegal drug transaction. United States v. A Parcel of Land, \_\_\_ U.S. \_\_\_, 113 S.Ct. 1126 (1993). The Court held that proof of a lack of knowledge was all that the statute<sup>5</sup> required and refused to read in to the statute an additional requirement that the

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<sup>5</sup>The federal drug law forfeiture provisions were amended in 1978 to provide: "[N]o property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. §881(a)(6).

protected owner be a bona fide purchaser for value, 113 S.Ct. at 1134, yet alone prove that she had done all she could to determine the source of the funds.

Regardless of the state of federal law, the Utah legislature has chosen to protect owners where the unlawful act was committed "without the owner's knowledge or consent." The wife here asserted under oath that the husband's possession of marijuana in her car was without her knowledge or consent. Affidavit of Norma Howard (R-80 ). That is all that the Utah statute requires.

**B. As the actual and equitable sole owner, the innocent wife was entitled to return of the vehicle.**

The court below observed that: "Were the Petitioner the sole owner of the vehicle she could assert an innocent owner's interest with persuasiveness." However, the trial court went on to conclude that the wife was a joint owner with the guilty husband. Conclusion No. 2, Order Granting Summary Judgment (R-98, Appendix ii). The only basis for that conclusion was the fact that the vehicle was registered to "Leon (or) Norma Howard."

The wife asserted below that she was "the actual and equitable sole owner of the vehicle." Memorandum in Opposi-

tion, (R-65). The undisputed facts submitted in support of that assertion were set out in the Statement of Material Facts in the wife's Memorandum in Opposition (R-61-63) as follows:

In the summer of 1991, the prior owner of the subject Mustang car, Tricia Tedford, was staying with petitioner. Her boyfriend, Ricky Knox, was arrested while driving the car and extradited to Arkansas. The car was impounded because the registration was expired among other problems. Tricia and her infant child continued to reside with petitioner for six months until she returned to Arkansas. Tricia conveyed the Mustang car to Norma Howard in gratitude for her hospitality and because the storage charges were mounting and she could not afford to get the car out and had to return to Arkansas. (Affidavit of Tricia Tedford; Affidavit of Norma Howard) [R-72-79].

The Mustang was registered in late 1991 to Leon and/or Norma Howard because Leon Howard was a licensed driver and Norma was not. Leon Howard obtained a bill of sale from Tricia Tedford in a nominal amount to use in registering the vehicle. (Affidavit of Leon Howard) [R-76].

At the end of 1992, Norma and Leon Howard began to experience problems with their marriage. Norma Howard consulted with Legal Aid in the summer of 1993 and got on a waiting list to receive legal services to get a divorce. She requested at that time that she be awarded the Mustang. Norma Howard uses the Mustang to transport herself and her four small



children on errands. (Affidavit of Norma Howard) [R-79].

Leon Howard agrees that the Mustang automobile was Norma's separate property. Leon has two trucks and an automobile registered in his sole name. One of the trucks is a "dressed up" blue Nissan which he uses as his personal transportation. Leon would not drive the Mustang away from the residence without the express permission of Norma. (Affidavit of Leon Howard) [R-76].

It is submitted that in view of the foregoing undisputed facts, the court below should have concluded that the wife was the sole "owner" within the meaning of the statute and, since the unlawful use of the Mustang was without her knowledge or consent, was entitled to its return. At the very least, the affidavits raised a factual dispute on the issue.

The state in its Memorandum in Support of Motion for Summary Judgment (R-52) asserted the applicability of Section 41-1a-702(2)(a) of the Utah Motor Vehicle Code, which provides:

if a title certificate reflects the names of two or more people as co-owners in the alternative by the use of the word "or" or "and/or", each co-owner is considered to have granted the other co-owners the absolute right to endorse and deliver title and to dispose of the vehicle.

No doubt, if the husband had endorsed and delivered the certificate of title, the transferee would be able to defeat a claim by the wife. However, this is not a dispute as to ownership under the Motor Vehicle Code but a question of statutory protection against forfeiture.

In State v. One 1979 Pontiac Trans Am, 771 P.2d 682 (Utah Ct. App. 1989), this court was faced with the application of the closely analogous protection against forfeiture afforded to a holder of a bona fide security interest in the subsection immediately following the innocent owner subsection at issue here. This court affirmed the trial court's ruling protecting the unperfected security interest held by the guilty owner's grandparents against the forfeiture of a vehicle used to transport cocaine. The Motor Vehicle Code, in Section 41-1a-601, requires a security interest to be perfected to be valid against creditors acquiring a lien or subsequent purchasers. The grandparents in One 1979 Pontiac Trans Am, supra, were held to be protected by subsection (1)(e)(iii) of Section 58-37-13, Utah Code, by showing they were holders of a "bona fide security interest" despite the fact that that interest was not perfected as the Motor Vehicle Code requires. Similarly, the wife here should be held protected by subsection (1)(e)(ii) of that same section

by showing she was the actual sole owner despite the fact that her husband's name was also on the registration and she might not have been able to assert a claim of ownership against a purchaser who had a certificate of title endorsed by the husband because of the Motor Vehicle Code.

In determining the protection afforded an innocent co-owner under a similarly worded statute, the Michigan Court of Appeals, stated:

In particular, we reject the notion that the language of a title to a vehicle necessarily controls the rights of the owner under the Michigan forfeiture statute.

In re Forfeiture of \$53.00, 444 N.W.2d 182, 186 (1989). The Ohio Supreme Court also rejected the argument that ownership in forfeiture matters is conclusively established by the certificate of title and approved the protection of equitable ownership not of record, saying:

Initially, we must conclude that the provisions of R.C. 4505.04 were designed to protect title as between true and fraudulent title claimants and to create an instrument evidencing title to and ownership of motor vehicles. (Citations omitted). We do not hold that the legislature intended for said section to be construed to effectively deprive equitable owners of their interest in a vehicle where that vehicle may be

forfeited to the state.

State v. Shimits, 461 N.E.2d 1278, 1281 (Ohio 1984).

The State, seeking a forfeiture under Section 58-37-13, Utah Code, is not taking by endorsement of title by one of the record title holders and is bound by the provision of the forfeiture law that protects an owner without reference to how the ownership is shown on the registration or certificate of title. The wife, having established by uncontested affidavits that she was the actual and equitable sole owner and that any use of the automobile to facilitate possession of marijuana was without her knowledge or consent, established that the Mustang could not be forfeited and that she was entitled to its return.

C. Assuming that the wife and husband were co-owners, the wife is still protected against forfeiture as an innocent owner.

While appellant contends that she is the sole owner, she would still be protected if she were a co-owner with her husband and for purposes of this argument that will be assumed. The statutory protection given to innocent owners is not limited to sole owners and, for the reasons given in the immediate preceding discussion, is not defeated by making

an analogy between forfeiture and a conveyance under the Motor Vehicle Code.

While there are no Utah appellate cases directly on point, the majority of other state courts addressing the issue of the statutory rights of an innocent owner where a co-owner is guilty have either returned the vehicle or ordered the innocent owner protected to the extent of her interest. The Arizona Court of Appeals in In the Matter of 1979 Dodge Van, 721 P.2d 683 (1986), affirmed the lower court's order to return a van to an innocent wife whose co-owner husband was caught driving the vehicle with marijuana in it under a statute which protected a claimant who could prove that "the claimant is the lawful owner . . ." and that the unlawful act was without consent of the claimant.

The New Mexico Court of Appeals in In re Forfeiture of One 1970 Ford, 823 P.2d 339 (1991), interpreting a statute that is virtually identical to the Utah statute,<sup>6</sup> concluded that the protected "owner" included a joint-owner whose co-

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<sup>6</sup>The New Mexico statute provides: "no conveyance is subject to forfeiture under this section by reason of any act or omission established for (sic.) the owner to have been committed or omitted without his knowledge or consent." 823 P.2d at 340. The Utah statute provides: "a conveyance may not be forfeited under this section by reason of any act or omission committed or omitted without the owner's knowledge or consent." Section 58-37-13(1)(e)(ii).

owner son used their truck to transport marijuana for sale. The court noted that forfeiture provisions are not favored at law and are strictly construed against forfeiture. 823 P.2d at 341. Accord, Russell v. Park City Utah Corp., 548 P.2d 889, 891 (Utah 1976). The court however determined that the state was entitled to forfeit the son's interest and remanded with instructions to the lower court to use its equitable powers to protect both the mother's and the state's interests.

The Supreme Court of Nevada also construed a statute, identical to the New Mexico statute<sup>7</sup> and virtually identical to the Utah statute, as protecting the interest of a wife, whose husband had used their jointly owned vehicle in a drug transaction without her consent, specifically rejecting the lower court's theory that "consent (to the illegal use) is inherent in the nature of co-ownership." One 1978 Chevrolet Van v. County of Churchill, 634 P.2d 1208, 1209 (1981).

The Michigan Court of Appeals in In re Forfeiture of \$53.00, 444 N.W.2d 182 (1989), construed a statute, identical to those of New Mexico and Nevada and virtually identical to Utah's,<sup>8</sup> as protecting an innocent mother to the extent of

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<sup>7</sup> See Note 6, supra.

<sup>8</sup> See Note 6, supra.

her interest in a car jointly owned with her guilty son who used it to transport narcotics. In so doing, the court reversed its earlier position in People v. One 1979 Honda Automobile, 362 N.W.2d 860 (1984), which was relied upon by the State of Utah in its Memorandum in Support of Motion for Summary Judgment furnished to the circuit court in this case (R-52) to support its contention that the guilty knowledge of one joint owner was sufficient to provide a basis for forfeiture of the innocent wife's interest.

The Supreme Court of Colorado held in People v. Garner, 732 P.2d 1194 (1987), that while the guilty co-owner's interest in a vehicle used to transport and distribute illegal drugs was forfeitable, the interest of his ex-wife, who was an innocent co-owner, was entitled to protection under a mitigating provision of the statute which provided protection where the court finds that:

the possession of said property is not unlawful and the owner of said property was not a party to the creation of the nuisance and would suffer undue hardship by sale, confiscation or destruction of the property.

Section 16-13-308, 8A C.R.S. (1986), as quoted by the court, 732 P.2d at 1196.

The Appellate Court of Illinois in People v. Wiebler, 468 N.E.2d 1007 (1984), affirmed the denial of a petition for forfeiture where the state stipulated that a father did not have knowledge of the criminal use of a vehicle by his son who was a co-owner. The court described the statutory scheme, as follows:

At the hearing on forfeiture, the State must show by a preponderance of the evidence that the vehicle was used in the commission of an offense covered by the statute. Under section 36-2, the owner of the vehicle or any person whose right, title or interest is of record may then show by a preponderance of the evidence that he "did not know, and did not have reason to know" that the vehicle was to be used in the commission of the relevant offense. Ill.Rev.Stat.1983, ch. 38, par. 36-2.

468 N.E.2d at 1008. The state argued that, since the father and son were "joint owners," the son's knowledge of the illegal conduct was sufficient for forfeiture. However, the court held that the father was an innocent owner who could defeat the forfeiture of the vehicle altogether.

The Maryland Supreme Court in State v. One 1984 Toyota Truck, 533 A.2d 659 (1987), construed an innocent owner provision that provided:



No conveyance shall be forfeited under the provision of this section to the extent of the interest of any owner of the conveyance who neither knew nor should have known that the conveyance was used or was to be used in violation of this subtitle.

533 A.2d at 663. That court held that an innocent wife was entitled to the return of a vehicle owned with her husband as tenants by the entirety and used by the husband to transport and distribute controlled substances. While the statute only provided protection "to the extent of the interest" of the innocent owner, the court held that, because the wife's interest was to the entire vehicle, the vehicle could not be forfeited. 533 A.2d at 667.

**D. The appropriate relief for the innocent wife in the circumstances of this case is to order release of the property.**

As noted in the discussion of each of the cases in the preceding section, while all of them protected the innocent co-owner, the extent of the relief varied. Some courts, having found an innocent co-owner, concluded that forfeiture was precluded. E.g., People v. Wiebler, 468 N.E.2d 1007 (Ill. App. 3 Dist. 1984); Other courts permitted forfeiture of the guilty party's interest but protected the innocent

party to the extent of her interest. E.g., In re Forfeiture of \$53.00, 444 N.W.2d 182, 188-189 (Mich. Ct. App. 1989); People v. Garner, 732 P.2d 1194, 1198-1199 (Colo. 1987).

The Utah statute in the subsection protecting innocent security interests, Section 58-37-13(1)(e)(iii), provides for forfeiture "subject to the interest of a secured party." (Emphasis added). However, in the subsection protecting an innocent owner, Section 58-37-13(1)(e)(ii), the statute provides:

a conveyance may not be forfeited under this section by reason of any act or omission committed or omitted without the owner's knowledge or consent; . . .

(Emphasis added). This language supports the contention that the establishment of an innocent owner simply precludes forfeiture altogether rather than providing for forfeiture subject to the interest of the innocent owner.

However, in the circumstances of this case either interpretation entitles the innocent wife to the return of the Mustang because the "extent of her interest" happens to be the entire automobile. As argued in Section II B, pages 17-22, supra, the undisputed facts supported by affidavit were that the wife was the equitable sole owner of the Mustang having the right of possession and the husband was merely a

nominal co-owner on the registration. There is nothing in the record, even the fact of registration in the alternative, that suggests the wife had only a partial interest in the Mustang. Therefore, even if the state were to acquire the husband's interest by forfeiture it would acquire no property interest as against the wife.

This matter is more than a little complicated by the fact that the husband was not a party to the proceedings below and the State has not, to counsel's knowledge, sought to forfeit his interest, such as it may be. Since the husband has been convicted of possession of marijuana, the double jeopardy provision of the United States Constitution could preclude forfeiture of his interest because forfeiture cannot fairly be characterized as remedial. See, United States v. Halper, 490 U.S. 433, 109 S.Ct. 1892 (1989). The husband also could raise the prohibition against excessive fines contained in the Eighth Amendment to the United States Constitution according to the recent Supreme Court decision of Austin v. United States, \_\_\_\_ U.S. \_\_\_\_, 113 S.Ct. 2801 (1993). If affirmed, the court below's interpretation of the innocent owner protection could lead to the absurd result of the innocent owner's interest being forfeited while the guilty co-owner's interest is not.

III. FORFEITURE IS PRECLUDED BY CONSTITUTIONAL AND STATUTORY VIOLATIONS IN THE SEIZURES.

A. The initial seizure of the vehicle was the result of search and seizure in violation of the Fourth Amendment to the United States Constitution and Article I, Section 14 to the Utah Constitution.

The subject Mustang was seized for forfeiture incident to the arrest of appellant's husband presumably for the possession of marijuana. Affidavit (of Detective Harper) in Support of Motion for Summary Judgment (R-57). The claimed justification for the detention of the husband (and consequently the initial seizure of the wife's Mustang that he was driving) was a warrant for the search of the husband's person. Ibid.

Because there was no record whatsoever in the court that allegedly issued the warrant of the issuance or return of the purported search warrant, the counsel for appellant complained in the Verified Petition filed on September 28, 1993, twenty-six days after the raid, that he was unable to determine if the warrant was validly issued and therefore asserted it was not. (R -2). Almost two months later, as of November 23, 1993, the clerk was still reporting that there was nothing on file with regard to a search warrant for the

residence or the person of the husband and the appellant so informed the court below in the Memorandum in Opposition to Respondent's Motion for Summary Judgment and in Support of Petitioner's Cross-Motion for Summary Judgment. (R-68). In that submission, the appellant wife made the following argument: (R-69-69)

The Utah Search Warrant Statute, Section 77-23-4, Utah Code, requires a record be kept of the testimony providing probable cause. Utah Code Annotated, Section 77-23-7, requires that the serving officers "shall promptly make a verified return of the warrant to the magistrate." Apparently, neither was done. The obvious purpose of these statutes is to provide a method for persons affected to test the validity of the warrant and to determine the status of property seized. (The Utah Supreme Court has held a warrant invalid where the testimony showing probable cause was not reduced to writing. State v. Jasso, 21 Utah 2d 24, 439 P.2d 844 (Utah 1968). Whether the testimony was so reduced in this case is unknown but certainly it was not made a part of the court record which is the purpose of taking it in writing).

It is submitted that the gross deviation from the statutory procedure which occurred in this case deprived the

appellant of her right to be secure from unreasonable and warrantless seizures as guaranteed by the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Constitution of Utah. The obvious remedy is to deprive the state of the presumed validity of a seizure and search pursuant to a warrant where there is no court record of the issuance of the warrant or of a return over eighty days after the seizure.

Accordingly, the seizure and search of the husband (which resulted in the original seizure of the wife's automobile) and the fruits of that search should be held in violation of the wife's aforementioned constitutional rights.

Forfeiture may not be predicated on evidence seized in violation of the Fourth Amendment (and by parallel reasoning, Article I, Section 14 of the Constitution of Utah.) See, One 1958 Plymouth Automobile Sedan v. Pennsylvania, 380 U.S. 693, 85 S Ct. 1246 (1965).

In the court below, the state did not belatedly file the missing documents or offer any explanation for the lack of any record of the claimed warrant. The court below in the Order Granting Respondent's Motion for Summary Judgment (R-98, Appendix ii) concluded that the seizure of the vehicle was not illegal but did not specifically address the forego-

ing argument.

**B. Because the vehicle was seized without process directed to the vehicle the court below lacked jurisdiction to forfeit regardless of whether the detention, search and arrest were valid.**

In Davis v. State, 813 P.2d 1178 (Utah 1991), the Utah Supreme Court held that the forfeiture statute required that the seizure must be pursuant to a seizure warrant subject to four exceptions, and:

Implicit in all the exceptions to the requirement of a warrant is the principle that the seizure must be pursuant to some kind of process directed to the property (i.e., not just an arrest warrant) or required by exigent circumstances.

813 P.2d at 1181-82. In Davis, the vehicle had been used to drive to a location where drugs were purchased and divided up between suspects and the undercover officer within the vehicle. Later an arrest warrant was obtained, the vehicle's owners arrested and the vehicle seized for forfeiture incident to the arrest. Because there was no "process directed to the property" or exigent circumstances justifying a warrantless seizure, the Utah Supreme Court found the seizure invalid which in turn deprived the district court of

jurisdiction to order the forfeiture. Ibid. at 1184.<sup>9</sup>

In the instant case, while there might have been a search warrant directed at the home and person of Leon Howard, there clearly was no process "directed to the property," specifically, the Mustang automobile. Even if the search and arrest of Leon Howard were valid and the search of the automobile were valid (although it yielded nothing) as incident to the arrest, there was no justification for the forfeiture seizure of the automobile without process.

The court below concluded at (R-99, Appendix ii):

Additionally, the exigent circumstances of a car that at the moment could have been immediately moved, had been being moved. could be secreted by another party or readily transferred because of its joint ownership provided further basis for the seizure.

However, the undisputed facts were that the Mustang was blocked in the driveway of appellant's home by a police car. (R-77). There was no reason given by the officer explaining why a warrant authorizing the seizure of the Mustang was not obtained by telephone or otherwise while the police were in

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<sup>9</sup>See also State v. Larocco, 794 P.2d 460, (Utah 1990) (Plurality opinion), wherein the court limited the exceptions to the warrant requirements of Article I, Section 14 of the State Constitution as they pertained to an unintended vehicle on a public street to actual exigent circumstances.



full control of the property and the errant husband was under arrest. The court gives no reason why it concluded that the wife would be inclined to spirit the vehicle into hiding or sell it before the officers could get process even if that had been possible. There must be some evidence other than the obvious mobility of an automobile to conclude that it will be removed from the jurisdiction. See, State v. Will, 672 P.2d 1316 (Ariz. 1983). The Utah Supreme Court when applying Utah law has not followed the federal "automobile exception" which excuses a warrant simply because an automobile is involved and is mobile. See, State v. Larocco, 794 P.2d 460 (Utah 1990), (Plurality opinion); Davis v. State, 813 P.2d 1178 (Utah 1991).

No legal process was sought by the law enforcement officers prior to the forfeiture seizure which occurred on September 2, 1993 or even after the fact. No magistrate reviewed the matter, even ex parte, until appellant's petition for return of property was reviewed on the cross-motions for summary judgment sometime after November 30, 1993. For over three months, the appellant was deprived of her vehicle based upon the unreviewed conclusion that it was forfeitable made by a peace officer whose agency had an

interest in acquiring the vehicle for its own use.<sup>10</sup> The decision to seize property here was not only not made by a "disinterested magistrate," it was not even made by a disinterested police officer.


### CONCLUSION AND RELIEF SOUGHT

Since none of the underlying facts were in dispute and a proper application of the law to those facts leads to the legal conclusion that the wife, Norma Howard, was entitled to the return of her car, appellant requests that this court reverse the Order of the circuit court and remand the matter with instructions to issue an order returning the subject vehicle to Norma Howard. In the alternative, Appellant requests this court to reverse and remand with instructions to the Circuit Court to hold a hearing, within twenty days as Section 58-37-13(9)(e), Utah Code, requires, to resolve any factual matters this court determines to be unresolved.

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<sup>10</sup>The state's Answer to the Petition requested as relief that the property be awarded to the seizing agency. Paragraph 6 of the affirmative allegations states that the agency "is able to use the vehicle as an undercover vehicle." (R-45).

RESPECTFULLY SUBMITTED this 9th day of February,  
1994.

  
JOHN D. O'CONNELL  
Attorney for  
Petitioner/Appellant

CERTIFICATE OF MAILING

I hereby certify that on this 9th day of February,  
1994, I mailed two (2) true and correct copies of the BRIEF  
OF APPELLANT to RENA BARBIERO, Deputy County Attorney, 2001  
South State Street, #S3400, Salt Lake City, Utah 84190-1200.



## **APPENDIX**

**CIRCUIT COURT, STATE OF UTAH**  
**SALT LAKE COUNTY, SALT LAKE DEPARTMENT**

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|                |   |                             |
|----------------|---|-----------------------------|
| NORMA HOWARD,  | ) | ORDER GRANTING RESPONDENT'S |
|                | ) | MOTION FOR SUMMARY JUDGMENT |
| Petitioner,    | ) |                             |
|                | ) |                             |
| vs.            | ) | Case No. 930011027          |
|                | ) |                             |
| STATE OF UTAH, | ) |                             |
|                | ) |                             |
| Respondent.    | ) |                             |

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FACTS

No material issues of fact are in dispute. Respondent seized a jointly owned vehicle pursuant to the arrest of the driver who was in possession of marijuana. Petitioner is the other joint owner of the vehicle.

CONCLUSIONS

1. Utah Code Annotated 58-37-13(1)(e) requires the seized vehicle to be "used or intended for use, to transport and or in any manner facilitate sale, receipt, simple possession, or concealment" of a controlled substance. From the plain wording of the statutory language the legislative intent is to forfeit vehicles used in any manner in connection with controlled substances.

In this case the Mustang was being backed out of the defendant's driveway while Mr. Howard, the defendant, concealed

the marijuana. Such action appears to have been intended by the legislature to be subject to forfeiture. As Petitioner correctly points out, the statute does not provide for forfeiture of the vehicle merely because marijuana was in proximity to it. But this car was not parked next to marijuana. The Defendant possessing marijuana was not standing next to the car. The issue is not proximity. Rather it is as the legislature addressed, use in any manner. Defendant was inside the car with the marijuana, backing the car out of his driveway. Consequently the car was used in a manner that facilitated the possession and is therefore subject to forfeiture.

2. Petitioner owns the vehicle jointly with the criminal defendant. She knew the Defendant used drugs but didn't consent to his use of the vehicle in violation of the drug laws. Were Petitioner the sole owner of the vehicle she could assert an innocent owner's interest with persuasiveness. Here, however, the nature of the ownership is joint and the guilty knowledge of the defendant is a sufficient basis for forfeiture. Further, even if Petitioner could assert an innocent owner's interest, she does not argue that the car was either moved without her consent or that she did what she reasonably could to prevent the illegal use of the car by the defendant. Under federal case law only these two circumstances would support her assertion against forfeiture.

3. Finally, the seizure of the vehicle in this case was not illegal. Respondent's answer asserts that the vehicle was seized incident to an arrest and pursuant to 58-37-13 Utah Code

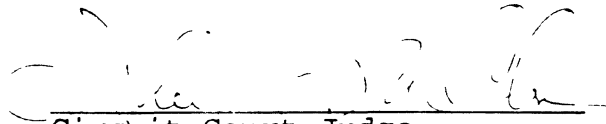
Annotated. Under Davis v State 813 p2d 1178, (1991), warrantless seizure of property is subject to forfeiture, among other exceptions, where the seizure is incident to arrest.

Additionally, the exigent circumstances of a car that at the moment could have been immediately moved, had been being moved, could be secreted by another party or readily transferred because of its joint ownership provided further basis for the seizure.

ORDER

Accordingly, Petitioner's motion for summary judgment is denied and Respondent's motion for summary judgment granted.

Dated this 3<sup>rd</sup> day of December, 1993.

  
\_\_\_\_\_  
Circuit Court Judge  
Sheila K. McCleve